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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1008, October Term, 1967

BERNES B. STONE.....PETITIONER

V.

COMMONWEALTH OF KENTUCKY.....RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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BERNES B. STONE ----------*Petitioner*

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OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is styled *Bernes B. Stone v. Commonwealth of Kentucky*, reported in 418 S.W. 2d 646 (1967).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (3), the proper provision for review of a state court judgment in a criminal case on certiorari. However, as will appear from the first portion of our argument, five of the questions petitioner attempts to present here under the Constitution of the United States have never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

QUESTIONS PRESENTED

The jurisdictional question raised below by respondent is not stated in the petition. Therefore, in order to retain the same numerical order of questions presented, the jurisdictional question will simply be labeled "preliminary jurisdictional question.".

PRELIMINARY JURISDICTIONAL QUESTION

Whether the questions petitioner has numbered I, III, IV, V and VI have been properly raised and decided in the Court of Appeals of Kentucky so as to give this Court jurisdiction to review them on writ of certiorari.

I.

Whether the amendment of the indictment at the beginning of trial to conform to the language of the statute without alleging a new or different offense deprived the petitioner of the right to be informed of the nature and cause of the accusation and the assistance of counsel contrary to the Sixth Amendment.

II.

Whether the product of a search conducted by a private investigator is barred from evidence by the Fourth Amendment to the Constitution of the United States; if so, whether the record shows as a matter of law that the search was proper as a consent search.

III.

Whether petitioner waived any question of determination by the Court of consent to a search; if not, whether consent was shown as a matter of law; if not, whether the question is mooted by the disposition of Question 11.

IV.

Whether there was some evidence to support a jury instruction on arson.

V.

Whether the jury trial guarantee of the Sixth Amendment is applicable in a state criminal trial; whether the jury reached a quotient verdict; if so, whether a quotient verdict to determine the years of sentence deprives the accused of a jury trial in violation of the Sixth Amendment.

VI.

Whether the trial court's refusal to permit a circumstantial evidence witness for the defense to testify under the rule excluding witnesses and permission for a prosecution witness to testify, where there was a reasonable difference as to the circumstances of each witness, constituted an abuse of discretion amounting to a violation of Due Process of law or Equal Protection of law contrary to the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Petitioner correctly quotes the Search and Seizure Clause of the Fourth Amendment, the Trial by Jury, Informing of Accusation, and Assistance of Counsel Clauses of the Sixth Amendment, and Due Process and Equal Protection Clauses of the Fourteenth Amendment on which he relies. However, in addition to the other arguments of respondent, it will be contended hereinafter that *Trial by Jury*, as distinguished from requirement of *impartial* jury, as guaranteed by the Sixth Amendment does not apply to state criminal proceedings.

Kentucky Statutes

Respondent contends that Section 227.270 of the Kentucky Revised Statutes (KRS 227.270) referred to in the Petition (pp. 4, 11) is *not* involved in any of the issues on this appeal.

Section 433.020 of the Kentucky Revised Statutes provides:

> "Any person who willfully and maliciously sets fire to, burns or causes to be burned, or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or another, that is not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or another; or any church, meeting house, courthouse, workhouse, school, jail or other public building, or any public bridge shall be confined in the penitentiary for not less than one nor more than ten years."

STATEMENT

The case is substantially stated correctly by petitioner. (Petition, pp. 5-8). However, the following material additions and corrections are made.

First, it should be noted that no Federal constitutional question was briefed or decided by the Court of Appeals of Kentucky on the questions petitioner has numbered:

I (Brief for Appellant (petitioner) in Court of Appeals of Kentucky, hereafter Brief, pp. 19-21);

III (There was no place this subject was even mentioned in the Brief or opinion);

IV (Brief, 31-35);

V (Brief, 29-31);

VI (Brief, 11-15).

The only place that the Constitution of the United States was mentioned in the Court of Appeals of Kentucky was in connection with the search and seizure claim pertaining to the

evidence produced by the witness, Kennedy. (Appendix to Petition 4A).

The amendment to the indictment did *not* state a *new charge* as claimed by petitioner. (Petition p. 5). It merely clarified the charge by reiteration of the language of the statute it was brought under, Section 433.020 of the Kentucky Revised Statutes (KRS 433.020, set out above; Appendix to Petition, pp. 11a, 12a; Transcript of Record, hereafter TR, 2, 28). The only significant addition by the amendment was the language "caused to be burned, or aided, counselled, or procured" the burning. No question of surprise was presented nor was there any request for a continuance. (Appendix to Petition, pp. 11a, 12a; TR 25).

Petitioner's references to the search made by the witness, Kennedy, are incomplete. Petitioner correctly notes that the witness was a private, professional fire and explosive investigator. (Petition, p. 6). Mr. Kennedy was engaged by Allstate Insurance Company (Transcript of Evidence, hereafter TE, 385). Petitioner fails to note that the conversation between Kennedy and petitioner on January 24, 1964, regarding permission to inspect petitioner's premises was *in the presence of petitioner's attorney.* (TE 772). Petitioner "and his attorney" said on that day they "would cooperate in every way possible." (TE 779). Kennedy testified unequivocally that petitioner consented to search of his premises during the conversation on January 24. (TE 771, 786). In addition to that evidence of consent, it was also shown that petitioner's contract of insurance with Allstate Insurance Company gave his written consent and authorized investigation by the insurance company which was carried out by Kennedy. (TE 390, 391; Appendix A to this Brief). Petitioner testified at trial that he had no right to object to the investigation by Allstate and would have consented in any event. (TE 1302-1305).

There was no quotient verdict as to the length of sentence as stated by petitioner (Petition, pp. 7, 8). While petitioner

obtained the affidavits of three of the jurors to that effect, eleven jurors out of the twelve (including two of the original three whose affidavits were filed on behalf of petitioner) made affidavits that the jurors all expressed their preference of sentence, ranging from one to ten years, then they averaged out the preferences and discussed them. They then all agreed on four years as the sentence for petitioner. (TR 48-53; Appendix B to this Brief). This was not a quotient verdict as will be demonstrated under Argument V hereafter.

As to the witness, Kennedy, as to whose testimony petitioner complains (1) because he was allowed in the courtroom although the exclusion of witnesses rule was in effect and (2) because testimony of a witness for petitioner was excluded under the rule, it may be noted that petitioner's counsel was aware that Kennedy was a key witness but stipulated in open court that he could remain at counsel table with the prosecutor. (TE 20, 21; Appendix C to this Brief). There was no such agreement as to petitioner's witness, Aull, a fireman who was in the courtroom during the testimony of two other firemen in violation of the rule (TE 1497).

MATTERS AND GROUNDS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

ARGUMENT ON PRELIMINARY JURISDICTIONAL QUESTION

THE QUESTIONS PETITIONER HAS NUMBERED I, III, IV, V AND VI HAVE NEITHER BEEN RAISED NOR DECIDED IN THE COURT OF APPEALS OF KENTUCKY SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THEM ON WRIT OF CERTIORARI.

As noted in the statement of the case, no Federal question was raised or decided in the Court of Appeals of Kentucky ex-

cept that labeled II by petitioner, the search and seizure question.

Rule 23-1 (f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."* (Emphasis added.)

The subject matter of what indication that a state court's decision turned on a federal question will move the Supreme Court to review it is extensively discussed in Annotations at 84 L.ed. 925 (1940) and 100 L.ed. 1200 (1956). As indicated, and supported by a great mass of authorities from this Court, it is necessary for a petitioner to show that a federal question actually arose in a case (84 L.ed. 927), and that it was actually passed upon and decided by a state court. 84 L.ed. 935.

In *Edelman v. Californmia,* 344 U. S. 357 (1953), this Court stated:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

In *Beck v. Washington,* 369 U. S. 541, 553 (1962), the reference to petitioner's constitutional contention in one sentence of

his brief in the Washington Supreme Court was considered to be an insufficient raising of the question.

Finally, as stated in *Maxwell v. Newbold,* 18 How. (U. S.) 511 (1856):

> ". . . But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state court, and might, and ought, to have been considered by it when making its decision. It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it."

It is manifest that, except for Question II, the petitioner has not shown that the questions he raises herein were properly presented and decided in the Court of Appeals of Kentucky and they have not been brought within the jurisdiction of this Court.

ARGUMENT I

THE AMENDMENT OF THE INDICTMENT AT BEGINNING OF TRIAL TO CONFORM TO LANGUAGE OF CHARGING STATUTE WITHOUT ALLEGING NEW OR DIFFERENT OFFENSE DID NOT DEPRIVE PETITIONER OF RIGHT TO BE INFORMED OF ACCUSATION AND OF RIGHT TO ASSISTANCE OF COUNSEL.

The amendment to the indictment merely added language indicating commission of the crime of arson by aiding, counselling, or procuring the offense. This was the language of Kentucky Revised Statute 433.020, the charging statute, the number of which had already been endorsed on the original indictment. It did not state a new or different charge.

It is significant in connection with the effect of this amendment that petitioner did not even request a continuance. It is inconceivable, in view of the reference in the original indictment

to the statute which contains the language complained of, either that petitioner was unaware of the nature of the charge or that the assistance of his counsel was adversely effected.

We see no substance whatsoever to this contention. In addition, it is not properly before this Court as previously noted, because of lack of argument and decision in the Court of Appeals of Kentucky.

ARGUMENT II

THERE WAS NO SUCH CONCERT WITH STATE OFFICIALS IN A SEARCH CONDUCTED BY A PRIVATE INVESTIGATOR ON THE INITIATIVE OF AN INSURANCE COMPANY WHICH EMPLOYED HIM AS TO RENDER THE SEARCH WITHIN THE PROHIBITION OF THE FOURTH AMENDMENT; EVEN IF SO, THE RECORD SHOWS CONSENT TO THE SEARCH AS A MATTER OF LAW.

The only connection petitioner has shown between state officials and Kennedy, who was a private investigator hired by the insurance company which insured the premises on which the arson was committed, is that on the occasion when the investigator *conferred* with the petitioner about the investigation *in the presence if petitioner's attorney*, a state arson investigator was also present. The inspection of the premises was conducted by Kennedy without any participation by state officers and no contention is made to the contrary. The evidence as a result of the inspection was retained by Kennedy for the insurance company and was not connected with the State until it was used in evidence at the trial. The admission of this evidence obtained solely by a private investigator was proper under *Burdeau v. McDowell*, 256 U.S. 465 (1921). Petitioner seeks to distinguish that case on the ground that the state officers had no connection

at all with the case until after the search had been made. That is a distinction without a difference and misses the point of the *Burdeau* case. There is no question that the investigation by Kennedy was entirely motivated and initiated through his employment by Allstate Insurance Company. Allstate was obviously interested in its policy of insurance. The State was interested in the crime of arson. There is nothing unusual about the fact that both private investigator Kennedy and the State arson investigator were present at a formal meeting with petitioner when the subject of the fire was discussed in the presence of his attorney. The significant point is that, in this case, as in *Burdeau*, the government had nothing to do with the search and it did not fall within the purview of the Fourth Amendment.

Moreover, laying aside that contention for the moment for the sake of argument, the search was nevertheless shown to be a consent search as a matter of law. The witness, Kennedy, testified consent was given by petitioner *in the presence of his counsel*, after full explanation that Kennedy was investigating whether the fire was natural or wrongful. Petitioner had executed a contract of insurance with Allstate authorizing the private investigation he complains of. Petitioner conceded under oath on the witness stand that Kennedy had the *right* to make the investigation for the insurance company, and he would have consented to it if asked. He could have foregone any rights under the policy and asserted his right to privacy. This he declined to do *with the assistance of counsel*; he consented to the search.

There is no need to argue the constitutionality of KRS 227.270, referred to by petitioner. We do not seek in the least to justify Kennedy's search by that statute, nor did the Kentucky Court of Appeals.

There is no substantial Federal question presented by the search and seizure claim.

ARGUMENT III

PETITIONER WAIVED AND QUESTION OF DETERMINATION BY THE COURT OF CONSENT TO A SEARCH BY ARGUING IN THE KENTUCKY COURT THAT IT SHOULD BE SUBMITTED TO THE JURY; IF NOT, CONSENT WAS NEVERTHELESS SHOWN AS A MATTER OF LAW; IF NOT, THE QUESTION IS MOOTED BY THE ARGUMENT UNDER QUESTION II.

Petitioner contended in the Court of Appeals of Kentucky that the question of his consent to the search by Kennedy should have been submitted to the jury. (Brief for Appeallant (Petitioner) in Court of Appeals of Kentucky, pp. 6-11). There was no contention in the Court of Appeals that the consent question was a matter for the court. Clearly, petitioner has waived any right in this regard. There is no need for this Court to determine the applicability of the principle of *Jackson v. Denno*, 378 U.S. 368 (1964).

As noted in our statement above, Kennedy testified petitioner consented to his investigation in the presence of petitioner's counsel. Petitioner's contract of insurance with Allstate clearly authorized the investigation Kennedy made. Finally, petitioner conceded in cross-examination during trial that the insurance company had the right to make its investigation under the policy. Thus, consent was shown as a matter of law, and there is no need for a trial court finding in order to dispose of this issue.

In addition, this question is mooted if our contention with respect to Question II is sustained.

Finally, as noted under our jurisdictional argument, this question was neither argued nor decided in the Court of Appeals of Kentucky and this Court lacks jurisdiction over it.

ARGUMENT IV

THERE WAS SOME EVIDENCE TO SUPPORT A JURY INSTRUCTION ON ARSON.

The circumstantial evidence indicating petitioner's guilt of arson is summarized in that portion of the opinion of the Court of Appeals of Kentucky set out on pages 6a and 7a of the Appendix to the Petition. It is sufficient to note that under the circumstantial evidence submitted, the jury could have inferred that petitioner aided or procured another to set the fire or did it himself. Thus, this case presents no circumstances remotely resembling *Thompson v. Louisville*, 362 U.S. 199 (1960), under which a conviction *devoid of evidence* to support it was a denial of Due Process. The *sufficiency* of evidence, is, of course, not a federal question.

As noted in our jurisdictional argument, this question was not argued and decided in the Court of Appeals of Kentucky so as to bring it within the jurisdiction of this Court.

ARGUMENT V

THE JURY TRIAL GUARANTEE OF THE SIXTH AMENDMENT IS NOT APPLICABLE IN A STATE CRIMINAL TRIAL; THE JURY DID NOT REACH A QUOTIENT VERDICT; A QUOTIENT VERDICT ON PUNISHMENT IS NOT A DENIAL OF JURY TRIAL GUARANTEED BY SIXTH AMENDMENT.

The Federal Constitution does not guarantee a *trial by jury* in state courts as distinguished from a trial by *impartial* jury once a jury trial is given by state law. *Fay v. New York*, 332 U.S. 261, 288 (1947).

Even if a jury trial were required in state criminal proceedings by the Sixth Amendment, it was not denied by a quotient verdict in this case as contended by petitioner. There is an exhaustive and excellent Annotation on quotient verdicts at 8 A.L.R. 3rd 335 (1966). As pointed out therein, an invalid quotient verdict is one where the jurors agreed prior to obtain-

ing the quotient that they would be bound by it and accept it as their verdict. 8 A.L.R. 3rd at 349. Use of the quotient process to obtain a jury verdict without an agreement to be bound by it is not improper. 8 A.L.R. 3rd at 355, 357. The references in our Statement clearly show that the jurors in this case reached a verdict on punishment of four years by a process of comparing their respective opinions. They *then* agreed on the four years. There was nothing improper in this. Twelve jurors were faced with the duty of reaching a single unanimous verdict as to a figure covering a span of one to ten years. Common sense tells us that could they not pursue some constructive discussion toward ultimate agreement every criminal case would end in a hung jury under the Kentucky practice of jury fixing of punishment.

Finally, petitioner's complaint about a quotient verdict relates to *punishment* and not to the determination of *guilt*. This Court judicially knows that punishment in Federal courts is determined by the court and not by the jury. It is utterly inconceivable that petitioner could have been denied a Federal right to trial by jury as to punishment.

As noted in our jurisdictional argument, this question also was not properly briefed and decided in the Court of Appeals of Kentucky so as to bring it within the jurisdiction of this Court.

ARGUMENT VI

PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION BY THE APPLICATION OF THE RULE EXCLUDING WITNESSES AS TO PETITIONER'S WITNESS WHO WAS IMPROPERLY IN THE COURTROOM DURING TRIAL AND THE FAILURE TO APPLY IT TO A PROSECUTION WITNESS WHO WAS IN THE COURTROOM BY STIPULATION.

A fireman was permitted to testify for petitioner as to the negative evidence that he did not detect accelerant fumes on the second floor of the building burned because he was improperly in the courtroom during the testimony of two other firemen in violation of the rule excluding witnesses which was requested both by the prosecution and by petitioner. On the other hand, testimony of the witness Kennedy was not excluded under the rule because he was present in the courtroom by stipulation of petitioner.

Petitioner refers to a "practice" of having the witness sitting with the prosecution testify first "under Kentucky law," and therefore says the testimony of Kenendy should have been excluded. (Petition, p. 8). We are unaware of any Kentucky law to that effect and petitioner who has the burden cites none.

The rational distinction between the circumstances surrounding the application of the rule excluding witnesses as to the witness Aull and the witness Kennedy is an adequate answer both to the Due Process and to the Equal Protection contentions of petitioner. In other words, the application was in the exercise of a *reasonable* discretion by the trial court.

As noted in our jurisdictional argument, this question also was neither argued nor decided in the Court of Appeals of Kentucky so as to bring it within the jurisdiction of the Court.

CONCLUSION

No question presented in the petition is within the jurisdiction of this Court except the search and seizure question. Petitioner has failed to show that a Federal question of substance, including the search and seizure question, was decided by the Kentucky Court of Appeals in a way probably not in accord with applicable decisions of this Court. On the contrary, the opinion of the Kentucky Court of Appeals is manifestly consistent with the Constitution of the United States and the decisions of this Court, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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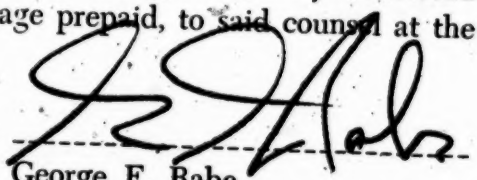
PROOF OF SERVICE

I, George F. Rabe, one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of March, 1968, I served a copy of the foregoing brief on Jack G. Day, 1748 Standard Building, Cleveland, Ohio 44113, and William E. Rummage, Masonic Building, Owensboro, Kentucky 42301, counsel for petitioner, by mailing a copy in a duly addressed envelope with first class postage prepaid, to said counsel at the above address.



George F. Rabe

APPENDIX A

RELEVANT EXCERPT FROM TRANSCRIPT OF EVIDENCE, pp. 389-391, ALLSTATE CONTRACT PROVISION ON INVESTIGATION OF LOSS.

"Q. 15 And is that, as a matter of fact, in the Allstate Policy?

A. This is exactly the same words.

Q. 15 All right, sir. And read that to the Jury, would you please?

A. Line 90 starts "Requirements in case" of loss—or in case of a "loss occurs." It states that "The insured shall give immediate written notice to this Company of any loss; protect the property from any further damage; forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish complete inventory of the destroyed, damaged, and undamaged property showing in detail quantities, cost, actual cash value, and amount of loss claimed; and within sixty (60) days of the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured—" excuse me just a minute—"the interest of the insured and of all others in the property, the actual cash value of each item thereof, and the amount of loss thereto all encumbrances thereon, and all other contracts of insurance, whether they be valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose the building herein described and several parts thereof were occupied at the time of loss and whether or not it then stood on leased grounds and shall furnish a copy of all the descrip-

tions and schedules of all policies, and, if required, verif— if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and shall submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of accounts, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extra copies—and shall permit extracts and copies thereof to be made." And that concludes the line 123. That is what I read to him that day.

Q. 16 And this—I'll ask you if this is the exact copy that you read to him on that occasion?

A. This is the—this is the exact copy."

APPENDIX B

RELEVANT EXCERPT FROM TRANSCRIPT OF RECORD, pp. 48-53, AFFIDAVITS OF JURORS AS TO VERDICT.

"STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Comes the affiant herein Guy Harrison, after first being duly sworn and deposes and states as follows, towit:

That the affiant is a juror on the Daviess County Petit July, having served during the August and September, 1964 periods of the Daviess Circuit Court; that affiant was a member of the Petit Judy, was duly sworn and served as a member of the jury in the case of Commonweal!th of Kentuck vs. Bernes B. Stone, No. 15715.

That after this case was submitted to the jury, and after we retired to the Jury Room for our deliberations, each juror submitted to Roby Robertson, foreman, the number of years which represented each jurors' verdict, and it was agreed by all of the jurors that all of the twelve numbers submitted would be totalled and divided by twelve, and that the average figure determined by the division to the nearest year would be the verdict of the jury, and that each juror was bound by this average figure. Subsequently, each juror did not reaffirm this four-year sentence as being their individual verdict.

IN TESTIMONY WHEREOF witness my signature this 12th day of September, 1964.

/s/s GUY HARRISON"

———ooo———

"STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Comes the affiant herein Golden Acton, after first being duly sworn and deposes and states as follows, towit:

That the affiant is a juror on the Daviess County Petit Jury, having served during the August and September, 1964 periods of the Daviess Circuit Court; that affiant was a member of the Petit Jury, was duly sworn and served as a member of the jury in the case of Commonwealth of Kentucky vs. Bernes B. Stone, No. 15715.

That after this case was submitted to the jury, and after we retired to the Jury Room for our deliberations, each juror submitted to Roby Robertson, foreman, the number of years which represented each jurors' verdict, and it was agreed by all of the jurors that all of the twelve members submitted would be totalled and divided by twelve, and that the average figure determined by the division to the nearest year would be the verdict of the jury, and that each juror was bound by this average figure. Subsequently, each juror did not reaffirm this four-year sentence as being their individual verdict.

IN TESTIMONY WHEREOF witness my signature this 14th day of September, 1964.

/s/ GOLDEN ACTON"

———ooo———

"STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Comes the affiant, Hugo Zozjeck, after first being duly

sworn and deposes and states as follows, towit:

That the affiant is a juror on the Daviess County Petit Jury, having served during August and September, 1964, periods of the Daviess Circuit Court; that affiant was a member of the Petit Jury, was duly sworn and served as a member of the jury in the case of Commonwealth of Kentucky v. Bernes B. Stone, No. 15715.

That after this case was submitted to the jury, and after we retired to the Jury Room for our deliberations, each juror submitted to Roby Robertson, foreman, the number of years which represented each juror's verdict, and it was agreed by all of the jurors that all of the twelve numbers submitted would be totalled and divided by twelve, and that the average figure determined by the division to the nearest year would be the verdict of the jury, and that each juror was bound by this average figure, and to this each juror agreed.

IN TESTIMONY WHEREOF, witness my signature this 15th day of September, 1964.

/s/ HUGO ZOBJECK"

———ooo———

"ORDER

September 16, 1964

This day came William M. Gant, Commonwealth Attorney, and filed herein the Joint Affidavit of Roby Robertson, Joe Mullican, Golden Acton, J. B. Thompson, Sr., O. F. McEuen, James A. Abel, Wm. M. Leonard, Martin Bresler, Mark Mattingly, William R. Covin and Hugo Zobjeck, in opposition to defendant, Bernes B. Stone's motion for a new trial of this prosecution against him.

———ooo———

STATE OF KENTUCKY)
) SCT.
COUNTY OF DAVIESS)

AFFIDAVIT

Come the affiants, Roby Robertson, Foreman, Joe Mullican, Golden Acton, Guy Harrison, J. B. Thompson, Sr., O. F. McEuen, James A. Abel, William A. Leonard, Martin Bresler, Mark Mattingly, William R. Cavin, Hugo Zobjeck, and being first duly sworn state as follows: That they composed the Jury panel in the case of Commonwealth of Kentucky vs. Bernes B. Stone, Criminal Prosecution No. 15715 in the Daviess Circuit Court. Affiants state further that after determining by unanimous vote taken twice by the foreman that the defendant, Bernes B. Stone, was guilty as charged in the indictment, they attempted severally and collectively to fix the punishment of the defendant. They state that the foreman, Roby Robertson, polled each of the jurors concerning his preference as to sentence, which preferences ranged from one year to ten years. They state further that thereafter it was determined from addition of the preferences stated by each juror that the total time added together was fifty-four years, which when divided by twelve produced an average sentence of approximately four and a half years. Affiants further state that thereupon the entire jury made an effort to reach a verdict based upon the average time arrived at by the above method and that some of those jurors who had expressed a preference for a time in excess of four years agreed that they would agree to four years and some of those who had expressed a preference for less than four years indicated that they would agree to four years, whereupon the jury was again polled by the foreman and each juror asked to vote on the four year sentence. Affiants state that each and every juror, either by the raise of hand or a vocal "yes" agreed that the sentence be fixed at four years in prison and each of the affiants hereto state that it was his agreement, that he voted for a four year sentence and that

to his knowledge each member of the jury voted for a four year sentence so that it was a unanimous verdict of this jury and not cast by lot but by decision between the members to arrive at a fair sentence.

IN TESTIMONY WHEREOF, witness our signatures on this the 16th day of September, 1964."

[Eleven signatures and notarization omitted. Guy Harrison did not sign.]

APPENDIX C

RELEVANT EXCERPT FROM TRANSCRIPT OF EVIDENCE, p. 21, VOIR DIRE CONCERNING WITNESSES.

"Mr. Gant stated that he was going to ask Mr. Kennedy to be at his counsel table and that Mr. Rummage had no objection.

THEREUPON, voir dire examination was begun. During said voir dire examination there was an objection by Mr. Rummage, Counsel for the defense, and a conference at the bench and the following for the record:

(MR. RUMMAGE: I object to the question Mr. Gant asked whether they had an opinion of guilty or innocence. and the Court being advised overruled the objection, to which ruling the defense excepts and objects.)

Voir dire examination was continued by the Commonwealth, and during the voir dire examination at 3:10 P.M. Mr. Rummage stated the following at a conference at the bench:

MR. RUMMAGE: Comes the Defendant prior to the voir dire of the Jury by the Attorney for the Defendant and moves the Court to require the Commonwealth to bring out at the counsel desk or table, it should be, the individual, prosecuting witness selected by them heretofore to set at counsel table in order that the Defendant's Attorney might question the individual jurors in regard to this gentleman, Mr. John A. Kennedy from Chicago.

THE COURT: Sustain the motion."